IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1595

COLONIAL PIPELINE COMPANY,

Appellant

versus

JOSEPH N. TRAIGLE, COLLECTOR OF REVENUE,

Appellee

On Appeal from the Supreme Court of the State of Louisiana

REPLY BRIEF FOR THE APPELLANT

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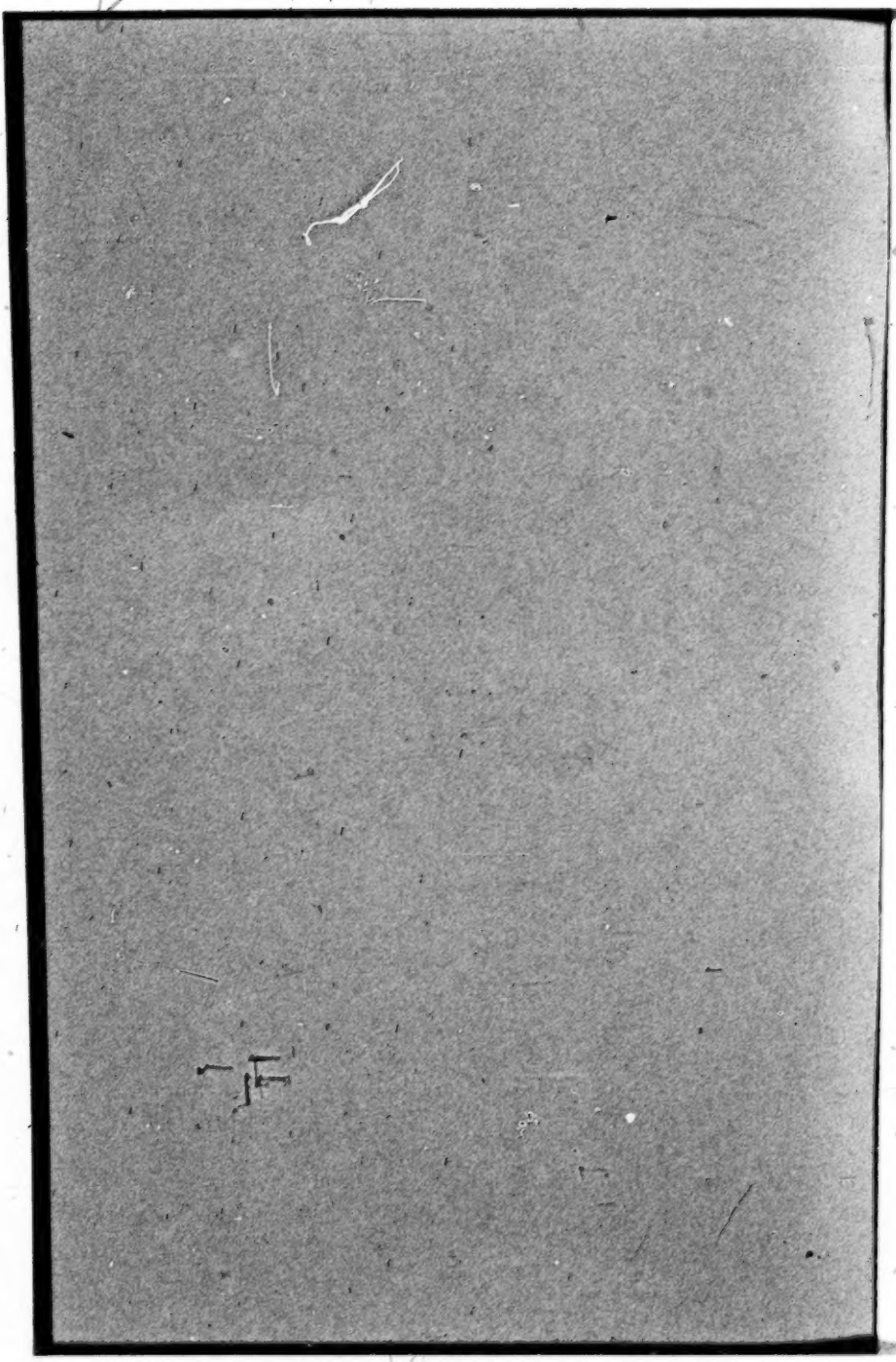

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CITATIONS

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The Tax Collector's brief requires response on several issues. Colonial accordingly files this reply brief.

I.

AS TO THE "BINDING NATURE" OF THE STATE COURT'S CONSTRUCTION OF THE TAX

The Collector argues that the state court has construed the statute as levying the tax upon "alternative operating incidents" and not upon the privilege of doing business in Louisiana; further, the Collector argues that the state court's construction is binding upon this Court (Collector's brief Pages 7-10). The state court's construction of the state law, however, constitutes the beginning, not the end, of this inquiry. Chief Justice Marshall pointed out long ago in *Elmerdorf v. Taylor*, 10 Wheat. 152, 23 U. S. 152, 6 L.Ed. 289, that federal courts accept state court determinations as final only upon matters of state law:

> ". . . [T]he construction given by the courts of the several states, to the legislative acts of those states, is received as true, **unless they come in conflict with the constitution, laws or treaties of the United States . . .**" (10 Wheat. at 160; emphasis supplied)

In making its inquiry into the validity of a state law under the Federal Constitution, this Court is not bound by a state court's shibboleth such as "separate local incident" or "alternative operating incidents." The question to be decided is whether the statute, as interpreted by the state court, amounts to a tax upon interstate commerce and thus infringes the Commerce Clause. And where, as here, the so-called "alternative operating incident" is inseparable from Colonial's interstate business, we submit that the Louisiana tax is a tax upon interstate commerce and thus infringes the Commerce Clause.

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 96 L.Ed. 436, 72 S.Ct. 424, this Court refused to be bound by the state court's determination that a franchise tax upon solicitation of interstate laundry business was a local activity, carefully pointing out the limitations of such state determinations:

> "The State may determine for itself the operating incidence of the tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.' " (342 U.S. at 392)

The tax was declared invalid and this Court significantly stated:

> ". . .The Commerce Clause created the nationwide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause." (342 U.S. at 395)

Thus, although Louisiana has construed the amended franchise tax as a tax on "alternative operating incidents," the state's determination as to the effect of the tax upon interstate commerce is in no way binding upon this Court.

Louisiana contends that the thrust of the statute is to tax not the interstate business done in Louisiana by Colonial, but the doing of such business in Louisiana in corporate form. Thus, says Louisiana, the tax is not upon the privilege of

doing business in Louisiana, but upon the privilege of doing business in Louisiana in the corporate form.[1]

This Court is no more bound by the Louisiana Supreme Court's determination that the privilege of doing interstate business in Louisiana in corporate form is a "local incident" than it was bound by the Mississippi Supreme Court's determination that solicitation of interstate business in Mississippi was a "local incident." To hold otherwise would effectively turn over to the states the power of determining whether a state tax "is or is not a tax on interstate commerce." Letting the states determine the extent of Commerce Clause restraints upon themselves is rather like leaving the fox in charge of the hen house. It is for this very reason that this Court forcefully stated in *Kansas City Structural Steel Co. v. Arkansas*, 269 U.S. 148, 46 S.Ct. 59, 70 L.Ed. 204:

> "We accept the decision of the Supreme Court of Arkansas as to what constitutes the doing of business in that State within the meaning of its own laws. Georgia v. Chattanooga, 264 U.S. 472, 483, 68 L.Ed. 796, 800, 44 Sup.Ct. Rep. 396. **But the court will determine for itself whether what was done by plaintiff in error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause.**" (269 U.S. at 150) (Emphasis added)

But even if doing business in corporate form be construed the taxable incident, the inquiry does not end there, as Louisiana would have it end. This Court has long since recognized that a state tax on "local activities" carried on by an

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[1] We make passing reference to the obvious by noting that Louisiana's **corporation** franchise tax, from its inception, has been levied only upon corporations, that is, upon taxpayers doing business in Louisiana **in the corporate form.** In this case the taxpayer is doing only interstate business.

interstate business can only be sustained as against a Commerce Clause challenge, if the so-called "local activity" is sufficiently separate from its interstate commerce to justify the levy. The Louisiana tax is not a tax on a "disconnected local incident" of Colonial's interstate business. However labeled, it is a tax or excise on Colonial's interstate business.

We suggest that the addition of a few words to the comment of the Louisiana Supreme Court appearing upon Page 30 and 31 of the Jurisdictional Statement will emphasize the fact that the tax as construed by the Louisiana court is a tax upon interstate commerce. First, it must be noted that the state admits that the only business done by Colonial in Louisiana is exclusively interstate business (Jurisdictional Statement, Page 26).[2] We have added the words in brackets:

> "The tax is due and payable on any one or all of three alternative incidents:
>
> a) doing [interstate] business in Louisiana in a corporate form
>
> b) the exercising of a corporation's charter [in interstate commerce] or the continuance of its charter [in interstate commerce] within the state and
>
> c) the owning or using any part or all of its capital, plant or other property [in interstate commerce] in Louisiana in a corporate capacity." (Jurisdictional Statement, Page 30)

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[2] In the words of *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S.Ct. 508, 95 L.Ed. 573; "the incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate commerce."

Each of the so-called "alternative incidents" is imposed unequivocally and directly upon interstate commerce. None represents a separate "local incident" or privilege granted to Colonial by the State of Louisiana, for Colonial gains its right to engage in interstate commerce in Louisiana from the national, not the state government.

As noted in Colonial's original brief, this Court has held that the privilege or right to carry on interstate commerce is not a franchise or privilege granted by the state, but on the contrary, is one which every citizen, corporate or otherwise, is entitled to exercise under the Constitution and laws of the United States. *Crutcher v. Kentucky*, 141 U.S. 47, 35 L.Ed. 649, 11 S.Ct. 851. Thus, under the Constitution, Colonial has the right of:

a) doing **interstate** business in Louisiana in a corporate form

b) exercising its corporate charter in **interstate commerce** and the continuance of its charter **in interstate commerce** within the state and

c) owning or using any part or all of its capital, plant or other property **in interstate commerce** in Louisiana in a corporate capacity.

The simple fact of the matter is that Louisiana has no right to levy a tax upon the privilege of doing interstate business in a corporate form because the privilege of doing such business flows, not from the state, but from the United States.

In the final analysis, to paraphrase this Court in *Memphis Steam Laundry*, if the Louisiana tax is imposed on doing interstate business in corporate form in Louisiana, the tax

stands on no better footing than a tax upon the privilege of doing interstate business. Therefore, accepting as correct the Louisiana court's construction of the operating incidence of the Louisiana franchise tax, that tax imposed, as it is, on Colonial's interstate business cannot stand under the Commerce Clause.

The fact that the statute does not discriminate does not save the tax. *Spector Motor Service v. O'Connor, supra.* The fact that the tax is apportioned does not save it from invalidity, for this is not a case where the taxpayer is engaged both in intrastate and interstate commerce. This is a tax which attaches solely because Colonial does its exclusively interstate business in corporate form. "The constitutional infirmity of such a tax persists no matter how fairly" it applies. *Spector Motor Service, supra.* Otherwise, the "federal privilege of carrying on exclusively interstate commerce free from state taxation" will no longer exist.

Clearly Louisiana could not prohibit a foreign corporation from "exercising its corporate charter" in interstate commerce in Louisiana. The privilege of engaging in interstate commerce cannot be granted or withheld by a state. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed2d 421. Since the state does not possess the power to grant or deny interstate business within its borders, Colonial obtains no franchise or right from the state for which the state may expect payment. *Cruther v. Kentucky, supra.* A state tax on the corporate capacity of a business engaged exclusively in interstate commerce, however ingenuously labeled, cannot be permitted to stand without ultimate destruction of these fundamental constitutional principles.

As noted in Colonial's original brief (Pages 12-19) the "erosion" cases relied on by the Louisiana Supreme Court and cited by the Collector (Collector's brief, Pages 16-24) are not determinative of the issue here. They involve peculiar facts and particular state statutory provisions, different in 'anguage or effect from the Louisiana statute. We therefore reiterate that this case offers this Court an opportunity to re-affirm the Commerce Clause as the intended safeguard for the free interchange of commerce and business activity among the states, and under the decided cases this Court is not bound by the Louisiana decision in doing so.

II.

AS TO THE "LOCAL ACTIVITIES"

The Collector, as did the Louisiana Supreme Court, relies heavily upon the case of *Memphis Natural Gas Company v. Stone*, 335 U.S. 80, 68 S.St. 1475, 92 L.Ed. 1832. Neither the Collector nor the state court, however, has pointed out one of the more significant determinations made in that case. Memphis Natural Gas Company was not simply an interstate common carrier; on the contrary, it owned the products which it was transporting and it actually made sales of gas in Mississippi to the Mississippi Power & Light Company. Moreover, in the words of Justice Reed, dissenting in *Interstate Oil Pipe Line v. Stone*, 377 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613, *Memphis Gas* was an "undecisive case" involving "disconnected local incidents." As pointed out above, *Memphis Gas* is not determinative of the constitutional issue raised by Louisiana's effort to lay a tax on Colonial's exclusively interstate business.

In *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71

S.Ct. 508, 95 L.Ed. 573, where, a state corporation franchise tax imposed on an interstate transportation business was held invalid, *Memphis Natural Gas* was distinguished:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate . . . The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, . . . See also Memphis Natural Gas Co. v. Stone. . ." (335 U.S. at 610)

Here Colonial does not own any of the products which it transports; it makes no sales in Louisiana; and it makes no intrastate deliveries in Louisiana. We reiterate: The incidence of the Louisiana tax, however stated, is upon no intrastate commerce activities because there are none.

Colonial's situation is virtually identical to that of Plantation Pipe Line Company in the case of *State of Alabama v. Plantation Pipe Line Company*, 265 Ala. 69, 89 So. 2d 549, certiorari denied 352 U.S. 943, 1 L.Ed. 2d 237, 77 S.Ct. 263. There Plantation was an interstate carrier of petroleum products through the state of Alabama and all of its property and all of its activities in the state were devoted exclusively toward the operation of its interstate facilities. The Alabama Supreme Court appropriately pointed out that:

> "It cannot be asserted that interstate commerce, to be immune from taxation, must be conducted in some sort of

vacuum without tangible property, personnel or incidental activities within the boundaries of the state. . ." (89 So.2d at 560)

There the state court, relying upon *Ozark Pipeline Corporation v. Monier*, 266 U.S. 555, 69 L.Ed 439, 45 S.Ct. 184, declared the state franchise tax unconstitutional. Subsequently, in *State of Alabama v. Transcontinental Gas Pipeline Corp.*, 271 Ala. 329, 123 So.2d 172, certiorari denied 364 U.S. 932, 5 L.Ed.2d 366, 81 S.Ct. 381, the Supreme Court of Alabama was again called upon to consider the constitutionality of that state's franchise tax as applied to a foreign corporation operating a natural gas transmission system extending from Texas and Louisiana to New York, operated under certificates of public convenience and necessity issued by the Federal Power Commission, which maintained compressor stations, metering stations and employees within the state necessary to insure the proper flow of gas. The state contended that because Transcontinental owned its gas and was not a common carrier and sold some of the gas to Alabama municipalities, the holding of the *Plantation* case did not apply. The Alabama Supreme Court found:

"Every activity carried on by appellee was found by the trial court to be a necessary, inherent and integral part of the interstate transmission of natural gas or the construction of facilities for such transportation."

The Alabama Court therefore concluded that Transcontinental was engaged exclusively in interstate commerce in Alabama and therefore, not subject to the Alabama tax.

In this case, the state has admitted that everything that Colonial has done since its entry into the State of Louisiana

has been in furtherance of its interstate business. It is fair to say, therefore, that every activity carried on by Colonial in Louisiana is "a necessary, inherent and integral part" of its interstate transportation of refined petroleum products. And Colonial's doing business in Louisiana in a corporate form is perhaps the most "integral" part of its interstate commerce activities in Louisiana. Clearly the carrying on of its interstate business in a corporate form is not a "local incident" separable from its interstate commerce activities, for it is the very framework by which that interstate business is conducted.[3] Colonial's corporate business form is the very "means and instrumentality" by which its interstate business is done. In no proper sense, therefore, does the conduct of its interstate business in corporate form constitute a "local incident" sufficiently separable from interstate commerce to support state taxation.

III.

AS TO LOUISIANA'S ENFORCEMENT AND COLLECTION PROCEDURES

The Collector has criticized some of our comments concerning Louisiana's statutory enforcement and collection procedures.

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[3] Even *Memphis Gas, supra,* and *Mid-Valley Pipeline Co. v. King,* 221 Tenn. 724, 431 S.W. 2d 277 (1968), relied on by the Collector recognized that in order for "local activities" of an interstate business to validly constitute the operating incidence of the franchise tax, such "local activities" must be "sufficiently separate from the interstate commerce" conducted by the taxpayer. As stated in *Memphis Gas,* they must be "events apart from the flow of commerce." Here we have no "event apart from the flow of commerce," for Colonial's corporate form is the business means by which the flow of commerce occurs.

Upon the basis of an unreported district court opinion and the denial of an application for supervisory writs by the Louisiana Supreme Court, the Collector (Page 28) claims that La. R.S. 47:1641 does not subject a taxpayer such as Colonial to criminal prosecution. The Collector argues that Section 1641 applies only to an agent of the state who collects a tax from a taxpayer and then fails to remit or account for such money to the state.

In Louisiana, the district court is the court of original jurisdiction and its opinions are unreported (La. Constitution, Article VII, Section 35). The denial of an application for supervisory writs by the Louisiana Supreme Court carries no rule of stare decisis. Neither does it indicate that the Court will act in the same manner on a subsequent application in a different case or upon the exercise of its appellate jurisdiction. The action of the Louisiana Supreme Court in this very case illustrates the point. In the first Colonial case, the Louisiana Supreme Court declined to review the judgment of the Court of Appeal, which declared the Louisiana tax invalid. In this case, the Court granted writs, noting that its refusal in 1969 does not carry the same weight as a precedent as it would had the case been decided by the Court after the granting of a writ. (Jurisdictional Statement, Page 30). See also *State v. Theard*, 212 La. 1022, 34 So.2d 248 and *State v. Pool*, 138 La. 228, 70 So. 107.

Thus, a different Louisiana district court might construe the Louisiana statute involved in a different fashion and might apply it to a taxpayer such as Colonial, subjecting it to criminal penalties. It should also be noted that if Section 1641 does not apply, then Section 1642 clearly does apply to Colonial.

That section provides for a $1,000 fine, one year in jail, or both fine and imprisonment for willful failure to file a tax return. That section is quoted in the appendix to this reply brief. Thus, whether the charge is under Section 1641 or under Section 1642, it constitutes a criminal charge against the taxpayer.

The Collector notes that in its original brief, Colonial refers to the provision of La. R.S. 47:401 as authorizing the state to obtain an injunction against further pursuit of Colonial's business if the tax is not paid. The Collector points out that Section 401 apparently applies only to the Louisiana occupational license tax—one of the few taxes which the Collector has not yet sought to impose upon Colonial.

We extend our apology to the Court and to counsel for this unintentional error in statutory citation.

The error in statutory reference, however, does not detract from the point which we sought to make in the original brief. Louisiana law does authorize drastic and summary collection procedures. For example, La. R.S. 47:1574 (which clearly does apply to the corporation franchise tax) authorizes the Collector to obtain a judgment by summary process, as a consequence of which injunction may issue, if sought by the Collector. That section further provides that the Collector's affidavit as to the tax due and all of the facts alleged by him "shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly" on the taxpayer. La. R.S. 47:1561 authorizes "assessment and distraint" and pursuant to La. R.S. 47:1572 any person subject to distraint may

be required by the Collector to "surrender such property or rights of property of which he is in possession."

We reiterate then, that Louisiana does employ drastic and summary collection procedures in the enforcement of the Louisiana corporation franchise tax, including assessment and distraint, summary process, recordation of a "lien, privilege and mortgage on all the property" of the taxpayer, and criminal sanctions.

We again also assert that these drastic enforcement provisions point up the interference with the flow of interstate commerce which Louisiana's corporation franchise tax imposes when sought to be levied upon a business corporation engaged exclusively in interstate commerce. While the Collector's brief implies that failure to file a tax return and to pay taxes alleged to be due only brings forth a discreet request for payment, the Louisiana statutory provisions quoted in the Jurisdictional Statement and in our original brief amply demonstrate that Louisiana maintains the power and authority to shut down the flow of commerce should the corporation franchise tax not be paid. As such, the tax constitutes an effective condition precedent to a foreign corporation's continuing its interstate business activities in Louisiana.

We do not say that Louisiana's collection procedures alone render this excise tax unconstitutional. On the contrary, we submit that the tax, as levied, is an unconstitutional burden upon interstate commerce, no matter how enforced or how collected. These drastic collection procedures merely serve to illustrate the real and practical danger which the Louisiana franchise tax poses to the free flow of interstate commerce.

CONCLUSION

For the above reasons and for the reasons given in the original brief filed by Colonial herein, we respectfully ask that judgment be rendered reversing the judgment of the Supreme Court of Louisiana and declaring the Louisiana Franchise Tax Statute unconstitutional as sought to be applied against Colonial's exclusively interstate business.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, one of the attorneys for Colonial Pipeline Company, plaintiff-appellant herein, and a member of the Bar of the Supreme Court of the United States hereby certifies that on the 27th day of December, 1974, I served three copies of the foregoing brief on Joseph N. Traigle, successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, by placing same in an envelope addressed to his counsel of record, Chapman L. Sanford, and Whit M. Cook II, State of Louisiana, Department of Revenue, Legal Division, P. O. Box 201, Baton Rouge, Louisiana 70821, and depositing said envelope in the United States post office at Baton Rouge, Louisiana, with first class postage prepaid.

Baton Rouge, Louisiana, this 27th day of December, 1974.

R. Gordon Kean, Jr.

APPENDIX

The following additional Section of Title 47 of the Louisiana Revised Statutes is involved in this case:

§ 1642. Criminal penalty for evasion of tax

Any person who wilfully fails to file any return or report required to be filed by the provisions of this Sub-title, or who wilfully files or causes to be filed, with the collector, any false or fraudulent return, report or statement, or who wilfully aids or abets another in the filing with the collector of any false or fraudulent return, report or statement, with the intent to defraud the state or evade the payment of any tax, fee, penalty or interest, or any part thereof, which shall be due pursuant to the provisions of this Sub-title, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned for not more than one year, or both.

History and Source of Law

Source:

Acts 1940, No. 265, § 33.